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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001559-MR

CAROL PLUMMER, INDIVIDUALLY
AND AS THE ADMINISTRATRIX
OF THE ESTATE OF BRANDON PLUMMER;
AND KENNETH PLUMMER — APPELLANTS

APPEAL FROM GARRARD CIRCUIT COURT
v. HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 09-CI-00450

WILLIAM LAKE, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS A
POLICE OFFICER, AGENT, EMPLOYEE
AND/OR SERVANT OF THE CITY OF
LANCASTER POLICE DEPARTMENT;
TIMOTHY ROYCE, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS A
POLICE OFFICER, AGENT, EMPLOYEE
AND/OR SERVANT OF THE CITY OF
LANCASTER POLICE DEPARTMENT;
CITY OF LANCASTER POLICE
DEPARTMENT, A POLICE DEPARTMENT
CREATED AND MAINTAINED BY THE CITY
OF LANCASTER, KENTUCKY; CITY OF
LANCASTER AS A POLIICAL SUBDIVISION
OF THE COMMONWEALTH
OF KENTUCKY; AND THE ESTATE
OF CARLOS CUNNINGHAM — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND LAMBERT, JUDGES.

CLAYTON, JUDGE: Carol Plummer, individually and as administratrix of the Estate of Brandon Plummer, and Kenneth Plummer appeal the Garrard Circuit Court's grant of summary judgment in favor of William Lake and Timothy Royce, police officers; the City of Lancaster Police Department; and, the City of Lancaster, Kentucky. We conclude that the actions of the police officers were not negligent, and if they had been, would have been protected by qualified official immunity. Accordingly, after careful review, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Carol and Kenneth Plummer are the parents of Brandon Plummer, who was tragically killed on January 16, 2009, in a head-on collision with Carlos Cunningham. On that day, several calls were made to 911 reporting that a teal-green sedan driving on Ky. 39 and heading toward Lancaster, Kentucky, was driving erratically and dangerously. It was later learned that the driver of the car was the aforementioned Carlos Cunningham.

As a result of the 911 calls, the Lancaster Police Department radioed its officers to be on the lookout for the teal-green sedan. Detective William Lake and Officer Timothy Royce responded to the call. Detective Lake was driving an unmarked cruiser which was nevertheless fully equipped with emergency lights and a siren. He proceeded south on Ky. 39 and encountered a northbound red

pickup truck. The occupant of the truck waved to him and pointed south on Ky. 39, which indicated to Lake that the teal-green sedan was just ahead.

Shortly thereafter, an occupant in a red pickup truck (likely the same one that signaled Lake) pulled up to Royce, who was parked at the intersection of Ky. 39 and Crab Orchard Road and informed him that the teal-green sedan was stopped a short distance down on Ky. 39. Royce radioed the information to Lake and maintained his position.

As Lake proceeded south on Ky. 39, he saw the teal-green sedan at the end of a driveway on the left side of the road. Although traffic prevented him from seeing the license plate numbers, he observed the driver of the vehicle hanging outside the sedan door looking "lifeless." Lake became concerned that the driver was experiencing a medical emergency. Given the information from police dispatch and his observation of the driver's condition, Lake decided to perform a traffic stop. He turned around and drove back. At this time, Lake was able to distinguish the license plate number and also detect that the driver was back in the car.

Lake, however, was unable to pull into the driveway where the car was parked because there was insufficient space. He pulled into another driveway north of the driveway where Cunningham's car was parked. Lake then radioed Royce for assistance and to let him know that he had identified the car in question. Royce turned on his dashboard video camera and headed in Lake's direction on Ky. 39.

Lake next backed his car out of the driveway and headed in the direction of the driveway where Cunningham's car was parked. At this juncture, Royce arrived and the remaining events are captured on his video camera. Both officers activated the emergency lights on their cars. They thought that Cunningham would pull forward in the driveway and allow them to pull in behind him. But Cunningham backed his car out of the driveway. Lake had pulled his police cruiser so as to be parallel with Cunningham's car once he backed out, but, rather than stop and speak with Lake, Cunningham waved and drove off at a normal speed.

Royce angled his car slightly into Cunningham's lane to demonstrate that he wanted him to stop. Cunningham did not stop and Royce thought that Cunningham would ram the police cruiser. The police officers turned their vehicles around in adjacent driveways, turned their sirens on, and began to follow Cunningham. Lake's vehicle was in front of Royce's police cruiser.

Because Ky. 39 is curvy, the officers were unable to maintain visual contact with Cunningham's car. Lake regained visual contact of Cunningham at roughly Crab Orchard Road and Ky. 39. He saw Cunningham make an abrupt right turn onto Fall Lick Road. The officers followed Cunningham onto Fall Lick Road. Lake accelerated his vehicle to a speed of approximately 80 miles per hour but realized that Cunningham was still pulling away. He estimated that Cunningham was going 100 miles or more per hour.

Lake then radioed dispatch to see if he should continue pursuing Cunningham. Dispatch advised that Royce should take the lead because he was in a marked cruiser. Nonetheless, because of cross-traffic on the police radio transmissions, they did not hear this request. Both officers then slowed down when they realized that Cunningham was driving dangerously fast with no intention of stopping.

Unfortunately, when Cunningham was out of the sight of the officers, he lost control of his car where Fall Lick Road goes up a hill and makes a hard right-hand bend. Thereupon, he crossed the centerline of Fall Lick Road and hit head-on the pickup truck driven by Brandon Plummer. Both Cunningham and Plummer died as result of injuries suffered in the crash. The video camera's film showed not only that the officers did not see the crash because Cunningham was out of sight but also that the police vehicles had no difficulty stopping at the crash scene without colliding with the wrecked vehicles.

The Plummers filed suit against the Estate of Carlos Cunningham, Detective Lake, Officer Royce, the City of Lancaster and its police department alleging direct negligence claims against the officers and the City and vicarious liability theories against the City for the officers' alleged negligence.

On June 28, 2012, the Garrard Circuit Court granted summary judgment in favor of the police officers and the City. First, the trial court held that there is no duty for police officers to "contain" a suspect and, further, the decision to stop a subject is clearly discretionary, thereby entitling the officers to qualified

official immunity. Then, the trial court reasoned that pursuant to Kentucky Revised Statutes (KRS) 189.940(7) and the Policy and Procedures Manual of the City of Lancaster Police Department, the officers have a duty to operate their vehicles in a reasonable manner. But notwithstanding this duty, the trial court next considered legal causation. It pointed out that legal causation is a mixed question of fact and law and, thus, is decided by a court as a matter of law. Since neither officer's vehicle was involved in the collision, the trial court determined that the officers, as a matter of law, were not the legal cause of the collision between Cunningham and Plummer. Accordingly, the trial court concluded that summary judgment was appropriate.

Next, the trial court decided that, contrary to the Plummers' arguments, the officers' actions were not ministerial because the decision to follow Cunningham was discretionary. Further, the trial court disagreed with the Plummers' interpretation of the Manual, which they suggested converted a discretionary decision into a ministerial decision. Instead, the trial court held that the officers' actions were discretionary and, consequently, entitled to qualified official immunity. Lastly, the trial court incorporated the reasoning of the appellee's memorandum in support of their motion for summary judgment and held that the Lancaster Police Department did not fail to adequately train or supervise the police officers.

Thereafter, the Plummers made two motions to alter, amend, or vacate the summary judgment. Both motions were denied by the trial court. They now appeal the decisions of the trial court which granted summary judgment.

On appeal, the Plummers argue that summary judgment was improper because the officers breached a duty of care both in failing to contain Cunningham and also in pursing him. Further, the Plummers maintain that the officers violated various provisions of the Manual. And finally, that the officers were not entitled to qualified official immunity.

STANDARD OF REVIEW

The standard for reviewing a circuit court's entry of summary judgment on appeal is well-established. We review such a decision to ascertain whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03.

To make such a decision, a trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001)(*citing Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). In addition, the moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to

present at least some affirmative evidence showing that there is a genuine issue of material fact for trial. *Id.* Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and reviews the issue *de novo*. *Lewis*, 56 S.W.3d at 436.

Keeping the summary judgment standard in mind, we now turn to the merits of this case.

ANALYSIS

The Plummers' claim is threefold. First, they propose that the police officers, Lake and Royce, operated their police vehicles in a negligent and careless manner, which was in direct contravention of the policies and procedures of the Lancaster Police Department Manual. Their ostensibly negligent actions resulted in the head-on collision between Cunningham and Plummer, which resulted in both individuals' deaths. Therefore, it is their contention that the trial court erred in granting summary judgment.

The Plummers assert that Lake and Royce were negligent when they initially discovered Cunningham parked in a driveway but did not "contain" him. Second, they contend that the officers' high-speed pursuit of Cunningham violated the procedures in the Manual. Finally, the Plummers argue that the police officers' failure to terminate the pursuit of Cunningham was a ministerial act rather than a discretionary act and, therefore, not subject to qualified official immunity.

To begin with, we deal with whether the police officers' actions are entitled to qualified official immunity, that is, whether the officers' actions with regard to Cunningham were ministerial or discretionary. If ministerial, the officers are potentially liable for their actions.

The doctrine of qualified official immunity

"Official immunity" is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. *Yanero v. Davis*, 65 S.W.3d 510, 521 (Ky. 2001). It is determined based on the function performed and not by the status or title of the officer or employee. *Id*. (*citing Salyer v. Patrick*, 874 F.2d 374 (6th Cir. 1989)). Moreover, when public officers and employees are sued in their individual capacities, they only have the opportunity for qualified official immunity, which affords protection from damage liability for good faith judgment calls made in a legally uncertain environment. *Id*. at 522. Thus, rather than sharing their government employer's immunity, public employees acting in their individual capacities are entitled only to official immunity for their discretionary acts occurring within the scope of their employment and to no immunity for their ministerial acts. *Id*.

Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, *i.e.*, those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority. *Id.* Conversely, an officer or employee is afforded no

immunity from tort liability for the negligent performance of a ministerial act, *i.e.*, one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts. *Id*.

In sum, under *Yanero*, the qualified immunity doctrine shields public officers and employees for the negligent performance of discretionary acts done in good faith and within the scope of their authority. *Id*. The potential liability of a public employee for negligent acts again rests upon the distinction between discretionary and ministerial functions. An employee is not liable for discretionary acts performed in good faith but is exposed to liability for those considered ministerial. *Estate of Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841, 845 (Ky. App. 2003).

Because the Plummers claim that the police officers are liable for failure to "contain" Cunningham, for not following the procedures and policies in the Manual, and for engaging in a high-speed police chase, we must examine the implications of qualified official immunity in the case at hand. To ascertain whether the police officers in this case were entitled to qualified official immunity, we must scrutinize whether their actions were discretionary or ministerial.

Again, we turn to *Yanero* for guidance on the issue of qualified official immunity. To determine whether the police officers' actions were discretionary or ministerial, it is important to ascertain whether any known rules governed the officers' actions. For example, officers have a statutory duty to drive

with care but are exempt from speed limitations when in the pursuit of an actual or suspected violator of the law as was the case herein. KRS 189.940(1)(b). In addition, the police officers herein operated under the auspices of a police manual.

Since there were statutory directives and an operating manual, it is necessary to see whether these factors impact the qualified immunity analysis, that is, whether their actions were discretionary and thus entitled to qualified immunity, or ministerial and thus subject to a liability calculus. The question becomes whether the existence of statutory and policy guidelines necessarily renders the officers' actions to be ministerial.

The determination of whether an act is discretionary or ministerial is no easy or straightforward task. In the decisive case of *Yanero*, the Court explained that a discretionary act involves the exercise of discretion and judgment or personal deliberation. *Yanero*, 65 S.W.3d at 522. Further, it described a ministerial act as one that is "absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." *Id*. For instance, the Kentucky Supreme Court explained that the teachers assigned to supervise a school-sponsored baseball practice were not entitled to qualified official immunity because the teachers did not follow an established school rule – that children were required to wear batting helmets during baseball batting practice. The Court said that the "enforcement of a known rule requiring that student athletes wear batting helmets during baseball practice" was a ministerial act. *Yanero*, 65 S.W.3d at 529.

The *Yanero* Court elaborated: "An act is not necessarily 'discretionary' just because the officer performing it has some discretion with respect to the means or method to be employed." *Id*. at 522. The Court emphasized "[t]hat a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in nature." *Id.*, *quoting Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky. 1959). The Court continued and observed that since few acts are purely discretionary or purely ministerial, the courts must look for the "dominant nature of the act." *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010). Based on this legal proposition, we must resolve whether the actions of the police officers in apprehending Cunningham were primarily discretionary or primarily ministerial.

In addition, as pointed out by the Plummers, the police officers were subject to policies and procedures in the Lancaster Police Manual, which guided their decisions regarding the necessity for a pursuit of a vehicle. The Plummers maintain that these procedures make the actions ministerial and mitigate against the actions being discretionary.

The Lancaster Police Department's policy concerning the pursuit of suspects is outlined in Chapter 17.10 of the Manual:

> It shall be the policy of the Lancaster Police Department (LPD) to limit the use of vehicular pursuits to those situations, which involve the attempted apprehension of persons wanted for the commission of criminal acts that threaten, may have threatened, or will threaten health, life, or the safety of a person or persons.

Clearly, the circumstances of this case demonstrate that Cunningham was engaging in acts which not only were criminal but also threatened the safety of others.

Next, the Plummers claim that Lake and Royce violated Section 17.10(A) of the policy:

> A. The LANCASTER Police Department will conduct vehicle pursuits only in the following instances:
>
> 1. On-sight pursuit of a known or suspected felon.
>
> Note: A felony charge that is a result of a police officer initiated pursuit, specifically, wanton endangerment, **is not case for continued pursuit.** (Emphasis in original)
>
> 2. On-sight pursuit of a traffic or misdemeanor violator, only if witnessed by the police officer or if a warrant is known to be in the file.
>
> 3. When directed by a supervisor to assist in a police pursuit.

Because of the "Note" in the manual, the Plummers assert that the police officers cannot justify their pursuit of Cunningham when he fled from the traffic stop. But the undisputed facts show that Cunningham fled the traffic stop prior to any pursuit. Consequently, Cunningham's flight was a clear violation of KRS 520.095(2), "Fleeing or Evading Police," which is a first-degree Class D Felony. Since Cunningham was in the commission of a felony, the officers complied with Section 17.10(A)(1) and (2) of the Manual and, further, contrary to the Plummers' suggestion, this was not a felony charge that resulted from a police-initiated pursuit.

Next, the Plummers profess that Lake and Royce violated the section of 17.10(B) that requires the officers to provide the following information to dispatch when embarking on a pursuit: unit number; location and direction of pursuit; description of the vehicle and the occupants; reason for the pursuit; and the speeds involved. But, dispatch already knew the unit numbers of the vehicles and description of Cunningham's vehicle. Further, the officers advised dispatch of the direction, location, and speed involved in the pursuit.

Finally, the Plummers maintain that since the unmarked cruiser driven by Detective Lake was in the lead, the officers violated Section 17.10(J):

> Officers in unmarked police vehicles should refrain from participating in vehicular pursuit. However if an officer in an unmarked vehicle is involved in a vehicle pursuit he should use the utmost of caution and awareness of safe vehicle operations. As soon as a marked police unit is in pursuit the unmarked police unit will become the secondary pursuit vehicle.

Still, a reading of the language of this provision does not absolutely prohibit an unmarked cruiser from participating in a police pursuit. Rather the language states "should refrain" but advises nonetheless that if an officer in an unmarked vehicle is involved in a pursuit, he or she must use the utmost caution. This directive exonerates Lake's action in taking the lead in the pursuit and obviates any violation of the Manual. The paramount purpose of this procedure is the safety of others as well as the police officer. For Royce to have assumed the lead, he would have had to pass Lake in the oncoming traffic lane on a narrow, curvy road in a densely populated rural area.

Therefore, no evidence was provided by the Plummers that the officers violated any exact precept of the manual. Furthermore, no evidence has been provided that the police violated the spirit and rationale of the Manual – to keep both police and citizenry safe.

Having addressed the Plummers' arguments regarding the Manual, we now specifically consider qualified official immunity in the case at hand. In Kentucky, qualified official immunity applies to public officials sued in their individual capacity if their actions were discretionary rather than ministerial, made in good faith, with the scope of their authority or employment, and do not violate a person's clearly established rights. *Rowan County v. Sloas*, 201 S.W.3d 469, 475-76 (Ky. 2006). No evidence has been provided that Lake and Royce acted in bad faith and/or outside the scope of their authority as police officers. In addition, it has not been alleged than any person's constitutional rights were infringed upon.

The Plummers do not contest the trial court's reasoning that the officers' decision to stop Cunningham, their methodology for doing so, and the decision to initiate a pursuit were discretionary. Nonetheless, they maintain that the officers' decision to continue and not stop the pursuit was ministerial and, therefore, under this line of reasoning, the officers are not entitled to qualified official immunity.

According to *Yanero*, a discretionary act involves the exercise of discretion and judgment or personal deliberation, and a ministerial act is one that is "absolute, certain, and imperative, involving merely execution of a specific act

arising from fixed and designated facts." *Yanero*, 65 S.W.3d at 522. Further, as observed in *Haney*, since few acts are purely discretionary or purely ministerial, we must look for the "dominant nature of the act." *Haney*, 311 S.W.3d at 240. Further, the purpose of the immunity is to protect public employees - in the instant case, Lake and Royce - from liability for a good faith judgment in a legally uncertain environment. *Jefferson County Fiscal Court v. Peerce*, 132 S.W.3d 824, 833 (Ky. 2004).

As observed, the Plummers acknowledged that the decision to initiate the pursuit was discretionary. Additionally, they provide no rationale to support that the decision to end the pursuit was somehow ministerial other than their reliance on Section 17.10(B)(3)(c) of the Manual. Section 17.10(B)(3)(c) provides that officers should terminate a pursuit when they recognize that the continuation of the pursuit "creates unnecessary peril to the safety of the police officers and /or citizenry." First, unlike the situation in *Yanero*, which required that the children wear helmets at practice, this section of the Manual does not provide any absolute instruction. Here, the officers must still ascertain whether stopping or continuing the pursuit is more advisable. Keep in mind the reports from citizens about Cunningham's behavior that stated he was "all over the road," operating his vehicle in dangerous, reckless, and erratic manner, and that he was likely to "kill somebody" if law enforcement did not intervene. Second, the officers did stop the pursuit of Cunningham. In fact, they stopped their pursuit so that when

Cunningham collided with Plummer, they were too far away to observe the accident. And it was not they who collided with either Cunningham or Plummer.

It is our belief that the decision to discontinue the pursuit is logically an extension of the officers' judgment and not separable from the decisions to stop and pursue Cunningham, which the Plummers have already acknowledged was discretionary. This decision is discretionary because it was necessary to discern the correct action in a legally uncertain environment. This reasoning is supported by the federal decision, *Walker v. Davis*, which determined that law enforcement's decision to initiate or continue a pursuit of a suspect is discretionary in nature. *Walker v. Davis*, 643 F.Supp.2d 921, 932 (W. D. Ky. 2009).

Finally, from a public policy perspective, it is important to consider the impact of withholding immunity when ascertaining whether acts are discretionary or ministerial. Police officers have a duty to protect the public. In hind sight, the aftermath of Lake and Royce not pursing Cunningham could have been equally devastating to the public at large.

Hence, we hold that the police officers were entitled to qualified official immunity because their actions were discretionary in nature and, therefore, the grant of summary judgment to them was proper.

Negligence of the police officers

We now address the Plummers' contention that the actions of the officers were negligent. (As noted, these actions if negligent are not liable for damages because of qualified official immunity.) The Plummers claim that the

police officers are liable for failure to "contain" Cunningham, for not following the procedures and policies in the Manual, and for engaging in a high-speed police chase. The issue involving the Manual has already been answered in the discussion above; nevertheless, the remaining issue involving negligence will now be addressed.

All owners, operators and persons in control of motor vehicles owe a duty to all other persons using the roadway according to the Motor Vehicle Reparations Act (hereinafter "MVRA"). KRS 304.39; *Pile v. City of Brandenburg*, 215 S.W.3d 36, 42 (Ky. 2006). Nothing in the Act exonerates police officers from this duty of care in the operation or control of their vehicle. *Id.*

In *Jones v. Lathram*, 150 S.W.3d 50, 53 (Ky. 2004), the Kentucky Supreme Court held that a police officer's response "to an emergency call for assistance from a fellow officer" was a ministerial act. *Jones* held that "the act of safely driving a police cruiser, even in an emergency, is not an act that typically requires any deliberation or the exercise of judgment," as "driving a police cruiser requires reactive decisions based on duty, training, and overall consideration of public safety." *Id*. This holding has been reaffirmed in other cases including *Pile*.

But in *Jones*, the police officer was driving a police vehicle in response to a call for assistance from another officer, was not engaged in a high-speed pursuit of a suspect, and the officer himself collided with another vehicle. All the cases examined by the Supreme Court in *Jones* involved cases where the

police cruiser collided with another vehicle. Neither Lake nor Royce was involved in a collision.

Further, with regard to the duty of care required of persons operating emergency vehicles - including law enforcement - under KRS 189.940(7), while police officers have a duty to operate their vehicles safely, they are exempt from speed limitations in several instances. One situation where they are exempt is the pursuit of an actual or suspected violator of the law. KRS 189.940(1)(b). As an aside, this exemption also requires that the police officers illuminate the vehicles' warning lights and sound the vehicles' siren. KRS 189.940(5)(a) and (b). In the case at bar, the police officers complied with this requirement.

Consequently, this case is distinguishable from *Jones*. Here, Lake and Royce were in pursuit of a suspect and did not collide with Plummer's pickup truck. The issue is not how they operated the police vehicles during the pursuit, but whether they should have engaged in the high-speed pursuit and/or terminated it earlier.

In the facts of this case, Lake and Royce pursued Cunningham at admittedly high speed, which is statutorily allowed, and slowed down when it became apparent to them that any higher speed would be dangerous. It is indisputable that their vehicles were not involved in any collision. No evidence has been proffered that they did not drive with care in this difficult situation.

As part of this same argument, the Plummers contend that the officers were negligent for failing to "contain" Cunningham when they first encountered

him parked in a driveway, that is, the Plummers assert that MVRA is applicable to a police officer's decision whether to "contain" a subject. This argument is not persuasive. No statutory authority or case law exists in the Commonwealth that imposes a duty on police officers to "contain" a suspect. In fact, the very case cited to support this proposition, *Pile*, distances itself from the issue of police detentions when it states that "[t]his is not a question of whether the police should have arrested someone. The case here raises the issue of ordinary care in violation of the statute." *Id*. at 43. In conclusion, there is no material evidence of negligence on Lake or Royce's part.

Tort liability for negligence requires the plaintiff to establish: (1) a duty; (2) a breach of that duty; (3) proximate causation; and (4) damages. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003). Duty presents a question of law and proximate causation presents a mixed question of law and fact. *Id.* The failure to prove any requisite element is fatal to a negligence claim. *Illinois Cent. R.R. v. Vincent*, 412 S.W.2d 874, 876 (Ky. 1967) (*quoting Warfield Natural Gas Co. v. Allen*, 248 Ky. 646, 59 S.W.2d 534 (1933)).

Briefly, in terms of the propriety of the summary judgment, we consider duty and causation. The MVRA speaks of a driver's duty to not be negligent in the operation or control of their own vehicle. *Pile*, 215 S.W.3d at 42. Here, neither officer collided with Brandon's pickup truck. Beyond this duty, the next question becomes what other duty the officers might have toward Brandon.

In the *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387 (Ky. 2001), the Court discussed a police officer's duty and held that in order for a negligence claim to be actionable, there has to be a special relationship between the victim and the officer or a duty owed to the victim. The Court elucidated that a "special relationship" requires that "(1) the victim must have been in state custody or otherwise restrained by the state at the time the injury producing act occurred, and (2) the violence or other offensive conduct must have been committed by a state actor." *Id*. at 392. (Citations omitted.)

Chipman is applicable here. Brandon was a motorist with no special relationship to Lake or Royce. Under the special relationship test, Brandon was not in state custody or otherwise restrained at the time the injury-producing act occurred. Consequently, absent a special relationship, the officers had no affirmative legal duty to act on his behalf. Without a duty, the Plummers' arguments of negligence are moot and the summary judgment is proper.

The Plummers attempt to distinguish *Chipman* by arguing that *Pile* changed the analysis. We remain unconvinced. The facts of *Pile* are very different. The police officer in *Pile* left a drunk driver unattended in the back seat of his running cruiser, which violated KRS 189.430(3). This statute prohibits leaving keys in the ignition of unattended cars on public road. When it distinguished *Chipman* in *Pile*, the Court said:

> *Chipman* has to do with whether or not an officer should have arrested someone. The fact that the officer has no duty to protect another person from a crime or accident is

> not an issue here. The negligence of Officer Miller and the violation of the statute made it possible for Blackwell to take the vehicle and cause it to crash. This is not a question of whether the police should have arrested someone. The case here raises the issue of ordinary care in violation of the statute.

Pile, 215 S.W.3d at 42-43. Here, the issue is an arrest of Cunningham and does not directly implicate a specific violation of a statute. Indisputably, Lake and Royce had no special relationship with Plummer.

Moreover, Kentucky recognizes the "public duty doctrine." As explained in *Chipman*, public officials are not required to insure the safety of every member of the public, nor are they personally accountable because the individual is a public official with a general duty of protecting the public. *Chipman*, 38 S.W.3d at 393. To impose a universal duty of care on public officials would severely impact their ability to engage in any discretionary decision-making on the spot. *Id.* This doctrine reinforces that to impose a duty of care on a public official, there must exist a special relationship between the official and the third party.

The next issue in the context of the argued negligence is causation. The Plummers seek to hold the officers liable, that is, responsible for Cunningham's actions in operating his vehicle. They assert that the officers caused the collision between Cunningham and Plummer. In the negligence context, causation constitutes either cause-in-fact or legal causation. Legal causation is a mixed question of law and fact. *Pathways*, 113 S.W.3d at 89.

As noted by the trial court, in Kentucky, the case of *Chambers v. Ideal Pure Milk Co.*, 245 S.W.2d 589, 591 (Ky. 1952), is dispositive on the issue of causation.

> To argue that the officers' pursuit caused Shearer to speed may be factually true, but it does not follow that the officers are liable at law for the results of Shearer's negligent speed. Police cannot be made insurers of the conduct of the culprits they chase. It is our conclusion that the action of the police was not the legal or proximate cause of the accident, and that the jury should have been instructed to find for the appellants.

Hence, based on *Chambers* and the fact that neither officer's vehicle was involved in the collision, we concur with the trial court's assessment that the officers could not have caused the accident. The lack of causation is fatal to the negligence claim and, accordingly, the summary judgment is proper.

CONCLUSION

In sum, because the actions of the police officers were discretionary, they are entitled to qualified official immunity. Furthermore, the Plummers' claim of negligence against the police officers, the City of Lancaster, and its police department is not actionable for failure to establish duty and causation.

For these reasons, the summary judgment of the Garrard Circuit Court is affirmed.

LAMBERT, JUDGE, CONCURS.

ACREE, CHIEF JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, CHIEF JUDGE, CONCURRING: I concur in the opinion with regard to the qualified official immunity analysis. However, I respectfully disagree with the need, for purpose of resolving the officers' liability, to engage in any further analysis. In deciding their immunity, we have decided they are not only immune from liability, but from further defense of their actions.

As for the remaining appellees, Section IV, page 11, of the summary judgment granted judgment in favor both of the City of Lancaster and the Lancaster Police Department on the claim that they negligently failed to train, supervise, and evaluate their police officers. When the appellants filed a motion to alter, amend or vacate the summary judgment with the trial court, they did not seek to disturb this section – *i.e.*, this judgment – in any way.

Similarly, before this Court, appellants did not argue any infirmity with regard to that judgment contained in Section IV. As set forth in their argument headings, appellants only argued that the trial court erred by finding:

> (1) the officers had not "violated their duty of care by failing to contain a suspected impaired driver and commencing and continuing a high speed vehicular pursuit which caused the death of Brandon Plummer";
>
> (2) the officers had not "violated the policy and procedures manual of the Lancaster Police Department"; and
>
> (3) the officers were "entitled to invoke the doctrine of qualified official immunity."

This failure to raise the issue in the brief constitutes a waiver of the issue. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004).

For these reasons, I see no need to analyze this case beyond our conclusion that the police officers were entitled to qualified official immunity.

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